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THE BREAKDOWN OF AMERICAN JUSTICE.

In the June number of Current Literature, we find the following: "The breakdown of American justice, as the London Mail deems it, accounts for that loss of confidence in courts of law which, it fears, is the most serious political fact our statesmen have to deal with. It traces the difficulty to an inefficiency of American judges generally when it is between a corporation on the one hand and an elementary principle of popular government on the other. The use of the writ of injunction is, says a writer in the London Post, a flagrant scandal. No English court, says this conservative daily, would pervert the writ of injunction with such indifference to every consideration of fair play as federal courts have done time and again. The American lawyer it describes as the hanger-on of corporations. No man of wealth has any fear of the law. The superior courts in America, chimes in the London Outlook, do not ask, when an appeal is taken to them, is the judgment just? but is there any error of whatever kind in the proceedings of the trial court? If there is, the presumption of prejudice exists at once, and the whole case has to be tried over again. It is this fetish-worship of forms and rules that has made the judicial procedure of America a menace to society. This menace has taken the form of predatory wealth to which the courts are subservient, and of indifference to human life which makes the United States show a far higher proportion of murders to the million inhabitants than any other country in the world except Italy and Mexico—and America is the only land where the number of murders is actually on the increase."

If all these charges were true, to the extent stated in the papers quoted, we would, indeed, be rapidly verging on to a revolution. But like most of the views of our country through foreign lenses there is much exaggeration. Nevertheless, there is more of truth in these statements than is generally contained in most of the European newspaper expressions regarding us. We are bound to confess that there is a great lack of efficiency on our benches and more of the rules of procedure have been perverted, because of such lack of efficiency, than for any other reason. The CENTRAL LAW JOURNAL has been pointing out to its readers the very great importance of having men on the benches who are really fitted to fill the positions. It is too often the case that corporations influence the appointment of judges, and that the opinions by such judges are biased in favor of such corporations by that fact. Most of our statute books provide, that in cases where it is plain that substantial justice has been done in the case brought up for review, even though there has been error committed, the judgment will be allowed to stand. Yet, in many states, this rule is wholly disregarded in cases where the record shows that justice has been done.

This is done more often through downright ignorance of fundamental principles of procedure than for any other reason. A little knowledge is a dangerous thing. As soon as a lawyer comes out of the law school, where he has been taught that procedure is a local matter and must be learned in the state where he expects to practice, he begins to look up cases, wholly neglecting finding fundamental principles, or does not find out that there are any which have stood the test of ages and are made the very foundations of every stable government. He wants to find out what some judge has said about it, and that, the very last expression, so he can go into a court, which has been enlightened by case law, with this most enlightened modern view, to still further enlighten the enlightened court.

Take the maxim we had occasion recently to comment on: *Lex non exacte definit sed arbitrio boni viri definit.* (The law does not exactly define but trusts to the judgment of a good [wise] man). How many of our courts are getting the view that, in case a statute requires the doing of a thing which in a particular case would cause great injustice, such court has the right to regard the statute as not applicable and use its judgment in the furtherance of justice. We are losing sight of the fact that due process of law is intended as the means of reaching justice, and that the duty of the court is to find out where the justice is in a given case, and apply the rules of construction to secure it. The fundamental rules of construction, which are to be found

in the maxims, are a wonderful system of reaching justice, when applied by a judge who knows those rules and their relationships. A judge who is not fully equipped with such rules, is as impotent as an unskilled workman, essaying the task of carving out of crude marble, a statue of Justice.

In the trained mind, fully equipped with a knowledge of the principles of procedure, there is the power to mould to justice as skillfully as the expert potter moulds his clay to the design of his mind. We seem to forget that there are some situations to which an act of a legislature could not have been intended to apply, and that such cases ought, by all means, to be left to the judgment of a wise and good man, and this applies to all, whether statute or common law, where a literal application of the rule would plainly do injustice. A judge ought not to be an automaton, and it is very plain that this is fully recognized in *Lex non exacte*, etc. If a judge has as his chief object the doing of justice, the rules of procedure, by which it is to be attained, will be understood and their relationships fully grasped. We must wake up to the importance of the office of a judge and demand that he have sufficient attainments to understand its duties and responsibilities. The due administration of the law is government itself and it will be maintained, so long as its foundations are kept from decay. Distrust of the administration of the laws will soon undermine the foundations of any government, and this warning comes thundering down the ages. The American bar has a tremendous responsibility on its hands and must be up and doing.

NOTES OF IMPORTANT DECISIONS.

VALIDITY OF AN AGREEMENT TO TAKE LESS SALARY BY A PUBLIC OFFICER THAN THAT PROVIDED BY LAW.—Abbott v. Hayes County (Neb.), 111 N. W. Rep. 780, contains a proposition which is interesting and may give rise to controversy frequently if not understood. At first blush, it might seem that the opinion of the court, expressed in the above case, was wrong, but, a little thought shows that it was based on a sound public policy.

The facts were as follows: "In the fall of 1889, M. J. Abbott was a candidate for the office of county attorney for Hayes county for the then ensuing term of two years. The statute fixed the salary for that office at $500 per year, but Abbott, in support of his candidacy, represented to the public that if he should be elected he would not demand or accept compensation exceeding $300 a year. He was elected and served throughout the term, during which he presented quarterly salary claims of $75 each, which were allowed as being in full of his compensation; but there was no specific stipulation between him and the board that they were such, and there was never at any time any agreement that his salary should be other or different than the sum fixed by statute. After the expiration of his term of office the plaintiff, as his assignee, presented to the county board a claim for $400, as for an unpaid residue of his salary. The board rejected the claim, and the plaintiff appealed to the district court, where he recovered a judgment for the amount of his demand with interest. From the judgment the county appealed to this court."

The court said: "There is no dispute about the facts. The case is ruled by Gallaher v. City of Lincoln, 63 Neb. 339, 88 N. W. Rep. 505. Counsel for the defendant seek to distinguish between the two cases because of the single circumstance that in the case cited there was a pretended contract by the terms of which the plaintiff undertook to serve for less than the statutory salary, while in the present instance there was no such agreement. We think the distinction is without a difference in principle. Indeed, it does not appear to us that the distinction itself exists. In the case cited there was a formal agreement, which, but for considerations of public policy, would have been valid, and which, but for such consideration, would have been ratified and renewed at every pay day. In this case there was no formal agreement, but there was a transaction every three months which, but for such considerations, would have amounted to an implied agreement to the same effect, and from such implication, and from it alone, counsel argues that there was on each such occasion a donation by the officer to the county of the undemanded residue of his salary. But, if so, there was in similar circumstances a series of successive donations by the police matron to the city, for the void formal agreement cannot be assumed to have influenced her conduct or that of the city council or to have restrained or prevented the exercise of her benevolent impulses. It is not worth while to repeat the argument contained in the former case, with which we are well satisfied, and which expresses the deliberate judgment of this court." The same doctrine was asserted in Gilman v. Des Moines, 40 Iowa, 200. See also Cent. Dig., Vol. 11, sec. 583 1-2.

THE COURTS AND THE RAILROAD QUESTION.

The many-sided contest over the transportation problem, which has temporarily centered in the debates upon and enactment of the Rate Bill by the federal congress, bids fair to demand nation-wide attention. As is usual when a country is confronted with a matter so vast, propositions varied and extreme, find ready support, and evils, whether real or fancied, are threatened with a mushroom growth of diverse schemes which would perhaps be worse than the evils to be remedied. The cause for unreasoning radicalism and vagary in dealing with public problems lies in the confusion or ignoring of first principles. Like all common carriers, the railroad transportation system is an indissoluble union of two things: a public function with private property; the one inalienable on principles of public policy and the other unassailable and non-forfeitable without due process of law; the former a utility which must be maintained absolutely unimpaired to the whole community and the latter the undoubted and vested property of individual owners. There are those who advocate not only the asserting by governmental power of its ownership of and control over the function, but with it the summary appropriation of the private property auxiliary, while others, with the greater stress upon the private property rights, claim the unqualified annexation to it, for private purpose and gain, of the sovereign function. Both propositions are self-evidently wrong, and outside of well settled principles of ordered society and law.

The common carrier system is an evolution of time, governed by principles and laws which are sound, reasonable and just. Nearly all the difficulties which from time to time have arisen with regard to it, and which now claim attention, are due not to faults in the system, nor yet to faulty legislation concerning it, but to incompetency of the courts in dealing with the principles involved and in failing to apply amply sufficient existing law. The system is the natural effect of conditions, public necessities and exigencies, limited and guarded by the time-seasoned and altogether just and expedient rules and principles of that great body of unwritten and non-statutory law of the Anglo-Saxon race, known as the common law. The essential character of these common law common carriers is such as to quite effectually circumscribe them, and there would have been little overreaching or oppression in the matters which have been made the subject of special agitation and remedial legislation, had the courts always based their judicial action on fundamental principles and asserted and applied the rules of the common law in dealing with controversies connected with the public carrying trade.

While the matters under discussion are intimately connected with branches of the law, there is no debatable law question involved. On the contrary, the questions are wholly elementary and beyond the region of debate. In regard to public carriage within the states, as distinguished from interstate public carriage, the conclusions would be more or less varied according to local statutory laws. Interstate commerce is not subject to the laws of the states, for such laws have no extra-territorial force, and the federal constitution vests in congress the power "to regulate commerce * * * among the several states." In the absence of legislation by congress, or in case of legislation, on all subjects not covered thereby, interstate commerce is governed by the common law. This was reasserted, even quite recently, in a case before the Supreme Court of the United States.[1] Apart from special state regulations and laws there is no difference between the status of intrastate and interstate common carriers. Congress has thus far passed no interstate commerce laws, except to provide against discriminations, expressly leaving the transactions otherwise subject to the common law rules, and in the main even such legislation was merely declaratory of the common law. The last amendment—the rate bill—prohibits free passes, and adds certain penalties for infractions of its provisions (which, by the way, are not likely to be enforced), and is an attempt to provide for the fixing of rates. On this last feature, in so far as it goes beyond the common law, it is, to say the least, doubtful if it will be upheld on constitutional grounds. In other respects the law is left practically as it stood before. All the public duties of common carriers are governed and limited by force of the common law. Under

[1] Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 921.

this they are bound to accept for carriage all things properly offered within the class which they hold themselves out to carry, to the extent of those means and methods of transportation which they own, use or hold themselves out to the public as possessing or controlling, and to safely carry them, and they are bound to hold all shippers harmless against loss or damage to the things carried, as absolute insurers, except for unprecedented occurrences and acts of the public enemy, which could not reasonably have been anticipated, the inherent vice of the things carried, and the acts of the shipper or consignee or their agents, and as to these exceptions they must all use reasonable efforts and means proportionate to the danger, to avoid damage or loss through them. They must make delivery to the consignee at the place of destination within a reasonable time, regard being had to all the attendant circumstances. They are allowed to charge no toll or freight in excess of what is reasonable and may not discriminate, either in the matter of charges or supplying facilities, between different shippers or localities. Their public rights and privileges, such as their franchises, right of way, the right to condemn and take private property for their public use as common carriers, under the law of eminent domain, and a certain limited police power, are now held under the laws and grants of the states in which they operate, and some of them, in a few instances, under acts of the federal congress. They are common carriers, not by provision or declaration of law, but by reason of their occupation—the inherent character of their business.

Such are the stringent rules of the common law with respect to common carriers which have always been applicable and should have been applied by the courts in railroad transportation cases. Yet the history of American railroads and public carriers, whether state or interstate, in court and out of court, has been a history of multiform abuses. By special rates, rebates, drawbacks and other devices, favoritism and preferences—so prolific of monopolies and trusts in the departments of business dependent on public transportation facilities—regulations made by themselves, public notices, etc., and by cunningly devised special immunity transportation contracts, these railroads have sought to entirely evade the law and have conducted their business in a manner utterly subversive of it; and the judges, stating or inferring that the arm of the law was powerless and fell short in dealing with the situations, have leaned upon their cushioned benches, in an attitude of helplessness, as if awaiting the enactment of sweeping laws, regulations and prohibitions to remedy the evils. They stand convicted out of their own mouths of culpable ignorance and official incapacity, or under suspicion of worse—venality or succumbing to undue influences. Lawyers hesitate "to speak evil of dignities." With scarcely an exception they have the highest regard for upright and honorable judges, who do their duty without fear or favor. And as to those illustrious ornaments of the bench whose broadened views, force of character and great ability enable them to stand out effectually against the abuses, overreaching and oppression by powerful corporations, this regard approaches reverence. But when instead of holding to the time tried motto: "*Fiat justicia, ruat coelum*," they adopt and act upon the idea: "The greatest good to the greatest number"—of their favorites—the very respect for the spotless judicial robe inspires disgust with the sullied ermine. "If a college of justice practices injustice," said Frederick the Great, "it is more dangerous than a band of robbers; for one can protect himself from the latter, but the former are rascals wearing the mantle of justice, to exercise their own evil passions, from whom no man can protect himself."

The special rates, rebates, drawbacks and other devices resorted to, or any discriminations whatsoever between different shippers and different localities, with reference to things within the duty of common carriers to accept for transportation, are, in the first place, repugnant to their character as common or public carriers, and the common law is against them quite as effectually as any acts of congress so far passed. The distinction between public and private carriers is marked. A private carrier need accept for transportation such things only as he is willing to contract for, and upon any conditions and limitations and under any contract or bargain, otherwise lawful, which he may be able to drive with intending shippers. Common carriers stand in the situation of private carriers, entitled to reject a proffered shipment, or to accept it upon special terms

and conditions, only in regard to such things as are outside of their class or usual carriage. Regulations and public notices in reference to the acceptation for and manner of transportation, disclaiming any of their liabilities, are equally out of harmony with the public function with which they assume to be and are invested. These seem to have had a quite ancient origin. In the history of common carriers it early became obvious that certain classes of shipments were of such a nature that the same could and should not be carried under the usual rules of responsibility, and the carriers sought immunity from them by regulations and public notices in regard to them, and carried the same, if at all, under special contracts—that is, as private carriers. This, in time was confounded with the matter of shipments of the usual class, and losing sight of the original nature and functions of the common carriers, they were permitted to evade the duties incident to that character in like manner. Clearly, the railroads should not be allowed by these means to arrogate to themselves and usurp the power of regulators of public commerce. The most extensively practiced infringement of the rights of the shippers by the railroads is the resort to so-called shipping contracts, in separate documents, or embodied in the receipts or bills of lading, by which they purport to be relieved from nearly all the liabilities in regard to the shipments which their business as public carriers and the rules of the common law impose upon them. By these it is usually provided that the shipment shall be at the "owner's risk." Instead of the carrier insuring the shipper against loss or damage to the things shipped, the shipper actually purports in these contracts to guarantee to the carriers that no loss or damage shall accrue to them in any way while the shipment is in transit, as a condition precedent to his right to use the road; instead of being bound to safely carry, the carriers are absolved from liability for any and all causes, in any event; instead of being obliged to deliver in a reasonable time, the matter of time of delivery is left practically at the carriers' discretion. Even damages or loss due to the carriers' negligence are waived. These instruments are as a rule lengthy documents, the important parts of which are printed closely in the smallest type, and not one in a thousand of them is ever intended to be read by the shippers before it is signed, or before delivery of the things to be carried, to the carrier. Most of them contain much that is wholly improper and unconscionable besides what is above pointed out. Yet the carriers' agents are forbidden to afford any facilities for transportation or to accept any shipment before such documents shall have been solemnly signed by the shippers. It needs no argument to establish that such dealings are not only against the laws and public policy but it should be evident at a glance that these pretended written contracts lack nearly every element of binding contracts. To a contract there must be contracting parties on equal footing with respect to the matter in negotiation who are free to reciprocally propose and accept or reject. The proper offer of the thing for shipment leaves the railroad no alternative but to carry it in the usual way, so this is not the subject of free negotiation. The rate of toll or freight charges must be the usual reasonable charge, and this is not a matter of free negotiation between carrier and shipper. For a valid contract there must be a lawful consideration. Any reservations, limitations or exceptions, in regard to the law-imposed duties of common carriers are invalid as against public policy and law, and the waiving of these things could not be otherwise than wholly without consideration. A lawful agreement or promise on the part of one party to a contract is a good consideration for the promise of the other party, but the agreement to perform or the performance of an already existing duty (whether by law imposed or assumed by previous contract), cannot become the basis for another contract without a new consideration. The carriers are by law under the obligation to accept the things offered for shipment, and to transport the same. Can the performance of this already existing obligation be taken as a consideration for contractual obligations or waivers on the part of the shipper? Clearly not. He would get nothing by his contract that he was not entitled to without it. Some of these transportation contracts purport to be made in consideration of a special transportation rate. As to this, first, no two rates in fact ever exist between which the shipper may be said to have chosen; hence, the claimed consideration is wholly fictitious. And if they did ex-

ist, and the shipper had availed himself of the lower rate, the carrier could not therefore be absolved from its public duties. Second, neither the common law nor the congressional regulations admit of two rates. The common law provides that there shall be but one rate, and that a reasonable one; the commerce acts do not go beyond this. The common carriers own the artificial facilities of their business under titles just as indefeasible and exclusive as that of other corporations or persons to their private holdings, but the law necessarily controls and the whole community is entitled to the unhindered and indiscriminate use of their public functions. In regard to these functions they stand in no very different relation to the community from that of any public officer or functionary. In short, the matter of a shipment over the public highways operated by the railroads is not the subject of barter and trade, but a matter of law-imposed duty. And yet courts have treated these instruments as entitled to serious consideration and as binding upon the parties named in them. Surely, here it would have required no "Daniel come to judgment" to nullify the bond and deny the pound of flesh. Of the Blackstonian disciples, take the merest novice and you will find him familiar with the definition and essentials of a contract. What must be the conclusion, in view of the fact that these things have gone through court after court as solemn contracts, determinative of the reciprocal rights of shipper and carrier, when they are as far short of being valid written contracts as they are of being theologic tracts? There are, O gentle, but sometimes quite fastidious and exacting public, corners in the halls of government wherein you have not brushed away the cobwebs recently. You have been laboriously scouring and polishing in the legislative and executive departments till with the dust and dirt, the gilt and varnish too came off. Now try your practiced hand in the judicial sanctum until your assiduity shall have rubbed down to the solid heart of oak and roughhewn granite.

Perhaps the most recent judicial expression touching the matter of these so-called contracts, comes from the Supreme Court of North Dakota.[2] In this case the validity of certain provisions in such a contract was directly considered. The document, as a whole, does not appear to have been passed upon, but the inquiry seems to have turned upon the validity of a provision with reference to the giving of notice of loss after the shipment had reached destination in damaged condition. Local laws could not affect the matter, for the shipment in question was interstate. The court considers that such a notice applies to the remedy, and that it is obligatory upon the shipper to give it, without regard to consideration, and that failure to do so will lose him his entire vested claim and cause of action for damages due to the carrier's negligence. The duty to give this notice must have existed either because it was a part of a lawful contract or as by law imposed. The contract is void for many reasons; the law does not impose the duty. In fact, courts have nowhere assumed that the law imposes such a duty, but claim that it is a reasonable regulation in and part of the contract. The common law recognizes the right in the carrier to prescribe certain reasonable regulations, but these necessarily and invariably refer to the time of shipment and not to matters arising afterwards, and none but the crassest ignorance could confuse this with such provisions of a contractual nature. All courts, it is said, have jurisdiction to err. The North Dakota court yields the palm to none in the exercise of this jurisdiction.

Under the original interstate commerce law a commission was created with power, among other things, to determine the reasonableness of freight rates, and during the first ten years of its existence the commission assumed that it also had power to prescribe rates to be charged in the future. But in 1897, in the Maximum Rate Case[3] the United States Supreme Court decided that to prescribe future rates is a legislative act; that the commission was a judicial body, and hence, that it had no such legislative power. Before there ever was an interstate commerce act, as we have seen, common carriers could charge only reasonable freight rates, and it had always been the province of the courts to adjudge and determine whether a given charge was reasonable or otherwise, and therefore, the powers legally conferred upon the interstate commission—that is, the judicial powers, added nothing to

[2] Hatch v. Minneapolis, St. Paul & S. S. M. Ry. Co., 107 N. W. Rep. 1087.

[3] 167 U. S. 479.

what had always been the law. It is obvious that to prescribe rules for the future conduct of carriers with respect to rates and charges is not a judicial function, because judicial authority can be exercised over and apply only to acts already done, or, by mandate, to future acts in particular cases, wherein the parties to the proceedings show themselves entitled to such relief. Moreover, the constitution does not confer upon the courts the power to regulate commerce. This is vested in congress alone. In view of the many phases of the question it is, at least, a matter of grave doubt that even congress has power to fix a freight rate. But granting this, it certainly cannot delegate this power to the courts, or to commerce commissions, acting in a judicial capacity in the judicial department. The rate bill seeks to obviate this objection by conferring a dual power upon the commission, first, to determine whether or not a given charge is reasonable, which, as stated before, has always been properly within the province of the courts, and second, to prescribe future rates. And then, confusion worse confounded, finally, the bill provides that the carriers shall have the right to apply to the courts for a writ of injunction to enjoin and restrain that which the commission in its legislative capacity has directed, which, as a sort of appeal from the legislative to the judicial department, may result in the judiciary reversing the legislature! Not like an appeal in ordinary procedure, wherein an appellate court may reverse the decision of a lower court, as to the constitutionality of a law within which the facts fall, but as to the wisdom and expediency of the rate fixed itself. Saving that it is more intricate and confused in this respect, on the whole, the law is about what it always has been: the carriers fix a rate, and the courts have the ultimate power to decide upon the reasonableness of such a rate, according to evidence produced before them in proceedings by the interested parties. Should the rate bill be upheld, entire, in the light of the experience of the past, with our courts failing to apply the plain and simple, yet forceful provisions of the common law to railroad cases, what may we expect of the courts under such a rate bill, really complex and difficult of application? What was needed was not new or additional legislation so much as enforcement of existing law, and application of sound principles by the courts.

There may be no other remedy for present evils than the revolutionizing of the entire carrier system, and operating it as a governmental institution. But in any event, a renovation of the judiciary would be more efficacious than a remodeling of the commerce laws. Many of the judges, whose tenure of office is elective, owe their elevation to the bench to shrewd manipulation of the nominating conventions of the dominant political party—in some cases, by friends and promoters of the railroad interests. All, or nearly all of them, travel the length and breadth of the land on free passes, and, in some instances, some have entered into the employ and stood high in the councils of legal departments of the great railroads, after their retirement from the bench. Although reform in other respects is necessary, in this department of government it is imperative. But to improve the judiciary must necessarily be a gradual work, and it will take a long time to accomplish the improvement. This branch of government should be, as nearly as may be, divorced from railroad influence. The dominant political forces are subject to that influence, and judicial candidates should not be nominated in general political conventions where such influences are controlling factors. The individual candidates may properly have political views and preferences, but they should be nominated in separate judicial conventions, and elected at special elections, at a time when the effect of the contest between the political parties and party spirit and party preference of the voters is as much as possible eliminated. The party preference of a voter ought not to have the slightest bearing upon his ballot for a judicial candidate. Candidates for legislative and executive offices properly stand for political party propagandism; judicial candidates do not. It is the business of a judge, after his election, to apply and enforce the laws as he finds them, without partiality, although the same may have been enacted as laws through the efforts of a political party opposed to his personal views—although the laws themselves are against his views. Some plan of nomination and election of judges should be devised by which a judicial candidate could be nominated and elected as the free choice of the voters,

based upon the peculiar fitness and ability of the aspirant, untrammelled by the machinations of railroads in the great party conventions and councils.

Federal judges, whose office is appointive, are, of course, outside of what is above intimated. These are usually of the better and abler class of lawyers. Recent investigations have indicated that state judges are rather of the inferior class. If public scrutiny be more particularly directed against the behavior of courts in general, instead of holding the searchlight almost exclusively upon the legislative and executive departments, this would of itself, tend to check the course of biased, partial and erroneous court decisions in these matters. In this connection it should be remembered that most of the litigation in reference to railroad transportation is in the state courts.

The present emergencies would not call for change in ownership of railroads, or revolutionizing the system, if the law were properly applied. To now appropriate the private things which unite with the public utilities in forming these highways would be neither expedient nor wise and just. Neither should the regulation and control of the function of public carriage be surrendered to corporations or persons, as a private asset. The government need not own the railroads if the law and not the railroads controls the courts. The public actually owns the highways now; the law should control them. The common carrier corporation originally was one of the institutions of normal and peaceable conditions, and like all citizens, corporations and peace-abiding creatures subject only to law and not to administrative force. To remove an interest which is said to constitute nearly one-fifth of the entire commercial fabric of the country from the law to the administration-regulated department of government is not without grave objections. But when, by reason of a long course of maladministration of law, insufferable oppression has resulted, the remedy of revolutionizing the governmental control of the oppressor naturally suggests itself.

When the common law which our forefathers added to the vast structure of civilization, as one of its strongest pillars, either in its original form or in the form of statutory enactments declaratory of it, shall be fully applied to the great transportation questions, and common carriers, whose character, scope and functions developed under the never dying principles of that law, are held to its restrictions by courts who will assert their independence of railroads and railroad politics, then, and not till then, will relief from railroad exactions and oppressions be at hand.

Wichita, Kan. M. C. FREERKS.

PLEADING—VARIANCE.

JENKINS v. CHESAPEAKE & O. RY. CO.

Supreme Court of Appeals of West Virginia, March 26, 1907.

Where, by a contract made between a county court and a railroad company for the mutual advantage of the parties thereto in preventing the spread of a contagious disease, the carrier agrees, in consideration that the county court shall provide and maintain a pesthouse for the care and treatment of persons infected with such disease, to furnish and properly equip a car therefor, and transport such persons to the pesthouse, one of the class of persons therein designated in whose interest it is made may maintain in his own name an action against such carrier, either in assumpsit upon the contract, or in tort, for damages resulting from a breach of its duty to him under the contract, or arising out of the relation of carrier and passenger after he has been accepted as a passenger.

In such suit a declaration, which counts as upon a special contract for carriage between the plaintiff and defendant for hire and reward, is not supported by proof of a contract between the county court and the defendant company, nor by the implied contract between the carrier and passenger; the variance being fatal.

Upon the trial of this case, an instruction for the defendant, which told the jury that the plaintiff, having alleged in his declaration that the defendant agreed to carry him for hire and reward and having failed to prove such allegation, was not entitled to recover in an action of assumpsit, was improperly refused.

MILLER, J.: The plaintiff in December, 1903, during the prevalence of an epidemic of smallpox in Fayette county, and who had been taken with that disease, was arrested at Montgomery by the health officers near the railroad of the defendant company about 3 o'clock in the afternoon, and put into a common box car and locked up, without any provision for fire or bed clothing to protect him from the severe cold weather then prevailing. This car was, about 6 o'clock in the evening of the same day, taken by the defendant, put into a freight train, and about 12 o'clock that night set out on a side track at Fire Creek, near the county pesthouse, without any notice to the defendant's agent or to the pesthouse authorities. The next morning about 10 o'clock the plaintiff was discovered, taken out of the car,

and carried to the pesthouse, where it was found that both his feet were badly frozen, so that in a few days the flesh began to slough off the bones, necessitating amputation of one leg in May and the other in July following. He endured intense suffering the night of his arrest and transportation and for several weeks afterward; but finally recovered from the disease, and was released.

The plaintiff had nothing to do with the arrangements with the railroad for his transportation. In November, 1904, he instituted this suit in assumpsit in the circuit court of Fayette county. The declaration is in two counts, to recover damages as for the breach of a contract for carriage with the defendant company. The first count charges that the defendant company on the 24th day of December, 1903, accepted the plaintiff as a passenger upon one of its freight trains for hire and reward, and then and there agreed to carry, transport, and deliver him safely and securely and protect him against the cold and inclement weather while such passenger from Montgomery to Fire Creek, and then and there deliver him to the superintendent of the county pesthouse. It then charges the defendant company with breach of its contract and duty to the plaintiff as a passenger. The second count counts upon an alleged contract or arrangement with the county court of Fayette county with the defendant company, whereby, in consideration that said county court would provide and maintain a pesthouse at Fire Creek for the purpose of treating, caring for, and preventing the spread of smallpox in said county and along the defendant's railway, detrimental to its business, the defendant agreed to provide and especially equip a car with necessary heat and conveniences for smallpox patients, and deliver all persons who might be suffering from that disease to the said pesthouse, to be there taken charge of by the county authorities. It is further alleged by said second count that the plaintiff, pursuant to this agreement and by authority of one of the members of the board of health of said county, was delivered to the defendant to be transported and carried from Montgomery to said pesthouse; that the defendant accepted the plaintiff as a passenger, and agreed to provide a comfortable car for the purpose, to protect him while in its charge from undue exposure to cold, and to safely deliver him to the pesthouse authorities; the breach of which contract of the defendant and of its duties to the plaintiff is charged as resulting in the injuries he sustained, and for which he asks $25,000 damages. The court below sustained the defendant's demurrer to the second count, and overruled it as to the first. There was issue and trial only on the first count, resulting in a verdict and judgment thereon for the plaintiff for $3.000. The trial court refused a new trial, and the case is here upon a writ of error prosecuted by the defendant company. Upon the trial there was practically no conflict of evidence respecting the manner in which the plaintiff had been dealt with by the health officers and by the railroad company, nor does the evidence leave any doubt that the plaintiff lost his legs by the cruel and inhuman treatment of the health officers and the agents of the railroad company; and, if we disturb the verdict and judgment, it will be because of technical rules of practice binding us and now urged for reversal of the judgment.

It is claimed by the railroad company that the plaintiff's remedy was *ex delicto*, and not *ex contractu*, and that his suit in assumpsit was not a proper substitute for one in case. The plaintiff, on the other hand, seeks to sustain the verdict and judgment, not upon an actual contract of carriage for hire and reward with the defendant as charged in the first count and of which there is absolutely no evidence, but, first, upon the implied contract which he claims arose out of the relationship of carrier and passenger while being carried from Montgomery to Fire Creek; and, second, upon the theory that the contract for carriage made by the county court with the defendant company was for his sole benefit, or for him as one of a class of smallpox patients, which he is entitled to enforce. The first count unmistakably pleads a special contract of carriage for hire and reward; and the verdict and judgment cannot stand unless the contract as laid is supported by proof. Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664, cited with approval in Kline v. McClean, 33 W. Va. 37, 10 S. E. Rep. 11, 5 L. R. A. 400; Davisson v. Ford, 23 W. Va. 617, 627. It is suggested that, while this count charges a contract of carriage for hire and reward, it does not allege payment of the price, and that the consideration charged may be treated as surplusage and the declaration stand as upon an implied contract arising out of the relation of carrier and passenger. In actions *ex delicto* words of promise, agreement, and undertaking contained in a declaration may be treated as mere inducement to the duty imposed by law; but in actions *ex contractu*, where there is an averment of a promise and consideration, the declaration will be construed as upon the contract, and not for the breach of the duty. 3 Hutchinson on Carr. (3rd Ed.), § 1328. And the plaintiff can recover only on the ground stated in his declaration. Hutch. on Carr., § 1406; Kidder v. Flagg, 28 Me. 477. The form of action in cases of this kind is sufficient, whether assumpsit for a breach of the contract express or implied to carry safely, or an action on the case for the wrong. The pleader, considering the advantages or disadvantages of the one or the other form of action, must make his choice. An action on the contract survives. One in case for the wrong dies with the death of the plaintiff. Hutch. on Carr., §§ 1403, 1404, 1405. At common law, in the absence of an express contract or promise, if from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation and consequential damages, although assumpsit may be maintained upon the promise,

the more appropriate form of action is in case. Hutch. on Carr., § 1408. In the case at bar the plaintiff elected to sue in assumpsit; and the count in the declaration upon which the trial was had was upon a contract of carriage for hire and reward described as entire. In such cases, if there be even a very slight variation in the proof of it from the description, the variance is fatal. Hutch. on Carr., § 1335, and cases cited; James & Mitchell v. Adams, 8 W. Va. 568; *Id.* 16 W. Va. 245; Cyc. 356; Colburn v. Pomeroy, 44 N. H. 19, citing 1 Ch. Pl. 297, and other cases. In an action of assumpsit one of the defenses is want of consideration. 5 Rob. Prac. 255. The only proof offered of any contract for carriage related to the one alleged in the second count of the declaration. The writ of error awarded does not bring up the action of the trial court in sustaining the demurrer to that count. We cannot look to it, therefore, to support the verdict and judgment. There was no issue on that count, no trial, and no response thereto by the verdict of the jury. Met. Life Ins. Co. v. Rutherford, 95 Va. 773, 780, 30 S. E. Rep. 383. From these authorities we are forced to the conclusion that the court below erred in refusing to give to the jury the defendant's instruction No. 1, based on the failure of the plaintiff's evidence to prove the contract as alleged, and in refusing to set aside the verdict of the jury and award the defendant a new trial.

The only other errors assigned relate to the rulings of the court below upon the plaintiff's instructions numbered 2, 3, 4 and 9. These are all based upon the theory of an implied contract of carriage, not the expressed contract alleged in the first count. Note 2 tells the jury, in substance, that if they find that persons other than the defendant or its agents put the plaintiff, infected with smallpox, in the defendant's car to be transported to the pesthouse and, after being informed thereof, hauled the said car from Montgomery to its siding at Fire Creek, the plaintiff thereby became a passenger in said car. The third says that, if under substantially the same circumstances stated in the second the defendant accepted the plaintiff as a passenger for the purposes stated, it became thereby bound to observe all the obligations of care, diligence, and provision for safety and comfort due from carrier to passenger in like condition. The fourth propounded to the jury the proposition that if a carrier, though not obliged to do so, accepts as a passenger one infected with a contagious disease, it is bound to exercise the degree of care commensurate with the responsibility it has thus voluntarily assumed to insure the safety of the passenger, considering his physical condition; and the ninth is substantially a restatement in a different form of No. 2. These instructions, while we think they correctly propound the abstract propositions of law covered by them and are supported by the authorities cited by counsel, yet they were not apropos. They might be suited to a case made upon an implied contract, but they ignore the necessary element of special contract charged in the declaration on which the case was tried. Point of Syllabus in Peters v. Nolan Coal Co. (decided at the present term), 56 S. E. Rep. 735. The defendant's objections to these instructions, therefore, were well founded, and should have been sustained.

The plaintiff has cross-assigned as error the ruling of the court below sustaining its demurrer to said second count. We think that count is good and, if sustained by proof, will entitle the plaintiff to recover. The contract being there stated, however, as an entirety, the plaintiff may possibly encounter some difficulties in sustaining it in all its parts by competent evidence. This count distinctly states an agreement, we think, upon a proper consideration, made between the county court and the railroad company, to meet the emergencies of an epidemic of smallpox and to provide against the same, not only in the interest of the public, but of the railroad company. On the part of the county court, it agreed to establish and maintain a pesthouse; and, in consideration thereof, on the part of the railroad company it agreed to provide and equip a proper car and furnish transportation for patients. While the contract as alleged was in the interest of the parties thereto, it was also made in the interest of a person of that class of which the plaintiff was one; and, when the plaintiff was received, voluntarily or involuntarily, as a passenger upon defendant's car, to be transported under that contract thus made, the obligations of carrier and passenger at once arose under the contract, as well as impliedly, for the proper, safe, and convenient transportation contemplated by the contract; and for a breach of the duty of the defendant to him under the contract the plaintiff would have a proper cause of action, either upon the contract or in an action *ex delicto*, as he might elect. This position seems well supported by numerous authorities cited by counsel. Among them are Hutch. on Carr. (2d Ed.), § 537 (see, also, 3d Ed., § 992, note 27); 3 Page on Cont., § 1308 and notes; Rowan v. Hull, 55 W. Va. 335, Syl., point 5, 47 S. E. Rep. 92, 104 Am. St. Rep. 998. Besides these authorities and others cited by counsel, our own code (Code 1899, § 2, ch. 71 [Code 1906, § 3021]) provides that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise." See on this subject, also, Nutter v. Sydenstricker, 11 W. Va. 547; Johnson v. McClung, 26 W. Va. 659, and Ross v. Milne, 12 Leigh. (Va.) 204, 37 Am. Dec. 646. This doctrine has been extended, by persuasive authority, to one of a class of persons where the class is sufficiently designated. Burton v. Larkin, 36 Kan. 246, 13 Pac. Rep. 398, 59 Am. Rep. 541; Johan-

nes v. Ins. Co., 66 Wis. 50, 27 N. W. Rep. 414, 57 Am. Rep. 249; Locklin v. Beckwith, 6 N. Y. St. 583.

We therefore reverse the judgment of the circuit court, overrule the demurrer to the second count of the declaration, set aside the verdict of the jury, and award the defendant a new trial; and the cause is remanded to the court below, with leave to the plaintiff, if so advised, to amend his declaration, and to be further proceeded with according to law.

NOTE.—*Can an Action be Maintained on the Contract of Carriage Which Was Broken by the Negligence of the Carrier by Merely the Proof of the Tort?*—The court fails to recognize that the proof of the tort, in the above case, was as complete a proof of the breach of the contract as could have been made. It is strange that the courts do not recognize that this case falls directly within the rule that where substantial justice has been done it ought not to reverse the case. This is generally provided in all codes and is a rule which has been frequently invoked whether or not provided by the code. The West Virginia Code provides: No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case. Code of W. Va. 1899, Rules & Pleadings, 850. The facts set up in the declaration were sufficient upon which to have based a recovery, and since West Virginia has done away with forms there should have been no question of the right of the plaintiff to instruct as upon a declaration for tort. The facts proven were the same in either event. There can be no sufficient ground upon which the defendant could have shown surprise. Had he recovered upon the contract he could not have successfully maintained an action for tort, for, it was *res adjudicata* and *vice versa*. These points do not appear to have been agreed in the case, and yet it appears to us they so clearly demonstrate the proposition, that, in such a case, the judgment should have been sustained, that there is not room for argument. In England the distinction between forms of action has been done away with by the judicature act. The point we make here was clearly brought out in the case of Kelly v. Metropolitan Railway Company, 1 Q. B. D. (1895) 944.

Said Lord Esher: "In this case the plaintiff was a passenger on the defendant's railway and he has been ignored by the act of one of their servants. The case was tried upon the assertion of the plaintiff that the servant of the railway was guilty of negligence, and the jury have found to that effect, and awarded £25 damages. £20 had been paid into court, and upon this state of facts arises the question whether the plaintiff is only entitled to costs on the county court scale, on the ground set up by the defendants that the action is founded upon contract. On the other side it is contended that the action is one in tort. I do not mean on the pleadings, but that it was brought and tried as an action in tort. In old times the question of injury to a passenger through something done by the servants of a railway company gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or in tort. In the former case he might allege a contract by the railway company to carry him with reasonable care and skill, and it was a breach of that contract; and on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent that was a matter upon which an action of tort could be brought. At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim in on one ground and proves it on another he is not now embarrassed by any rules as to departure. The question to be tried is the same in either case. * * * The jury have to determine on the facts of the case, and if they found there was negligence, which was the cause of the injury, they have in fact tried an action of tort." There is no wonder that the English papers are criticising us for such worship of forms which have become obsolete with the advent of the code. The courts are slow in finding out the practical application of the rule as laid down in the West Virginia code, or any other code in the states, which were intended to simplify, unify, and expedite the means of reaching justice. The duty to take care of the plaintiff in this case was just as binding on the company as though there was no special contract. Contrast the opinion in the principal case with the English case and note.

CORRESPONDENCE.

CONSTITUTIONALITY OF TRUCK ACTS AND SCRIP LAWS.

Editor of the Central Law Journal:

I have just read the article entitled "Truck Acts" in No. 20, current volume, pages 387-392. The views of the writer seems to be so perversive of the truth that it prompts me to send you this hurried and mild protest. The truth requires a statement of the fact recognized by all fair-minded legislators, statesmen and jurists, that the individual servant—employee—is at such a disadvantage as to make a contract between him and his employer impossible, and in fact no contract has ever been made in the general sense, as long as the relationship has existed. Hence we find that these states following the lead of English legislation have enacted laws requiring payment of wages in cash in 30 states and territories. See Bulletin of the U. S. Labor Department for September, 1904. The truth also requires a statement of the fact that, in every case not the servant but the master has "defended" the "liberty" of the servant to "contract" for "truck" and all the evils it represents. The truth also requires it to be stated, that the masters and not the employees surround every legislative, executive and judicial department of government seeking their aid and assistance, and that the word paternalism used by this class and its repre sentatives is used simply to discredit every advance which the wage class is making in political education.

Respectfully yours,

Chicago, Ill. THOMAS J. MORGAN.

REPLY OF MR. MYRICK.

Editor of the Central Law Journal:

I have read Mr. Morgan's letter in which he criticises my article on "Truck Acts" published in a recent number of your journal. Probably from a moral standpoint Mr. Morgan's opinions are correct. It is doubtless true that a great many legislators and statesmen entertain similar opinions. The truth of this statement is evidenced by the great number of "truck acts" found upon our statute books. But,

while these legislators and statesmen hold to these views, the courts are actuated by other considerations when passing upon the constitutionality of such laws. The courts look only to the reasonableness or unreasonableness of a given enactment. While the power of the state may be used to protect the public at large, or even a class of persons, against their own acts, it cannot be used to protect an individual against his own foolish, or ill-advised acts. *In re* Morgan, 26 Colo. 415. See Ritchie v. People, 155 Ill. 98. The reason for this distinction is that such protection would necessitate an inquisitorial control over private life and conduct such as a state could not consistently undertake to exercise. Fowler v. State, 5 Day, 81; Grim v. United States, 156 U. S. 604; Andrews v. United States, 162 U. S. 420; United States v. Martin, 50 Fed. Rep. 918; United States v. Lampkin, 73 Fed. Rep. 459; State v. Jones, 39 Vt. 370. The powers of the state are not intended to be used as a substitute for individual self control and responsibility, but as a safeguard against evils and dangers which are beyond the control of him whom they threaten. The right to choose one's course of action is a liberty within the protection of the constitution.

The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of the learned judges, but has not been approved by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of the fundamental rights by legislation which will not fall within the express or implied prohibitions and restraints of the constitution, and it is unnecessary to seek for principles outside of the constitution, under which such legislation may be condemned. People v. Cepperly, 101 N. Y. 634; Bertholf v. O'Reilly, 74 N. Y. 101. A law which simply encroaches upon the natural rights of a citizen will not be overthrown for this reason alone. This is a legislative and not a judicial question. Townsend v. State, 147 Ind. 624. With the wisdom, propriety, policy, or justice of, or necessity for such laws, the courts have nothing whatever to do so long as they do not infringe some provision of the constitution, state or federal, or some valid treatise or law of congress. Winters v. Jones, 54 Am. Dec. 379; Moore v. Veasie, 52 Am. Dec. 655; People v. Mugler, 55 Am. Dec. 266; State v. McClellan, 138 Ind. 395; Townsend v. State, 147 Ind. 624.

"The ideas of natural justice," declared the Supreme Court of the United States, "are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of judges, was inconsistent with the abstract principles of natural justice. There are then but two lights in which the subject can be viewed: First. If the legislators pursue the authority delegated to them, their acts are valid. Second. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act." Calder v. Bull, 3 U. S. 386.

Very respectfully,

Los Angeles, Cal. O. H. MYRICK.

BOOK REVIEWS.

MAUPIN'S MARKETABLE TITLE TO REAL ESTATE.

The title to this work conveys an idea of but part of its scope, as it is also a treatise on the rights and remedies of vendors and purchasers of defective titles (as between themselves), and includes the law of covenants for title, the doctrine of specific performance and other kindred subjects. This is the second edition. The lawyer who understands thoroughly what his rights are in a given case, ought not to find it a difficult task to ascertain the remedy. However, due process of law has gotten to have so uncertain a meaning that even the Supreme Court of the United States is beginning to lose sight of some of the initial points which have guided that court through safely in times gone by. Procedure is the most important matter, and it may be said that a lawyer does not understand his rights till he knows his remedy or knows what remedy is to be applied in case of a suit. So this work has been properly wrought out in providing a treatise on remedies of vendors and purchasers of defective titles. The author says: "Some difficulty has been experienced in choosing between several apparently appropriate titles for the work. That which has been selected 'Marketable Title' is satisfactory but requires a word of explanation. The modern use and acceptation of this term, it is believed, justifies its employment as the title of a treatise upon the rights of vendors and purchasers of defective titles, including as well the law of covenants for title as the equitable doctrine of doubtful titles. But originally the term was narrow and technical in its meaning, being used in equity to denote a title concerning which there was no reasonable doubt. The term was not known in law courts where titles were treated as good or bad, and judgment rendered accordingly. Hence, in law, a title might seem to be good which in equity the purchaser would not be deemed bound to accept. * * * Of late years the American courts have very generally applied the term 'unmarketable' to any title which a purchaser can not be required to accept." It will readily appear that such a work should be of great utility to the busy lawyer who has many cases with regard to real estate, or who attends to the drawing of deeds or contracts in relationship thereto. This second edition adds a number of new sections, and something more than seven hundred new decisions.

It is edited by Mr. Chapman W. Maupin, of the Washington, D. C., bar, and published by Baker, Voohis & Company, New York. It is well bound in buckram and contains 910 pages.

BOOKS RECEIVED.

The Encylopædia of Evidence. Edited by Edgar W. Camp and John F. Crowe. Volumes 8 and 9. Los Angeles, Cal. L. D. Powell Company. 1906. Review will follow.

The Law and Practice in Bankruptcy under the National Bankruptcy Act of 1898, by William Miller Collier. Fourth Edition by William H. Hotchkiss. Sixth and Revised Edition, with Amendments and Decisions to Date, by Frank B. Gilbert, of the Albany Bar. Editor of Street Railway Reports Annotated; joint author of Commercial Paper, etc. Albany, N. Y. Matthew Bender & Co. 1907. Buckram. Price $6.50. Review will follow.

HUMOR OF THE LAW.

"I vent to a lawyer apout some advice on my pizness, und he charged me fifty dollars for fife minutes' conversation."

"Gracious! Vot extravagant languich he must use."

The proprietors of a celebrated Swadeshi toilet preparation have been collecting testimonials from the leaders of Indian society. One learned justice ingeniously offers the following surprising testimony: "Very efficacious for weakness of the brain. I use it daily."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE—Matters of Defense.—The petition on an accident policy held not required to set forth clauses of the policy, which, if breached, would limit defendant's liability or exempt it from any liability.—Continental Casualty Co. v. Jennings, Tex., 99 S. W. Rep. 423.

2. APPEAL AND ERROR—Appealable Judgment.—A judgment improperly abating an action on a ground which precludes further proceedings is appealable.—Underwood Typewriter Co. v. Piggott, W. Va., 55 S. E. Rep. 664.

3. APPEAL AND ERROR—Objection not Raised Below. Where a bill in equity shows a want of jurisdiction, the question may be raised for the first time on appeal.—Thompson v. Adams, W. Va., 55 S. E. Rep. 668.

4. APPEAL AND ERROR—Review.—Where an order for the payment of money is appealed from, and is based on a former order, which is void, though entered more than two years before the appeal is allowed, the order appealed from will be reversed.—Kelner v. Cowden, W. Va., 55 S. E. Rep. 649.

5. BILLS AND NOTES—Estoppel.—The payee of a note given conditionally for corporate stock held not estopped from suing thereon because he had subsequently claimed ownership of the stock.—Key v. Usher, Ky., 99 S. W. Rep. 834.

6. BROKERS—Commissions.—Where a trustee of certain land after having employed plaintiff to sell it on commission canceled his authority, and sold the land at a less price to a purchaser with whom plaintiff was negotiating, plaintiff was entitled to recover commissions.—McGovern v. Bennett, Mich., 109 N. W. Rep. 1055.

7. CANCELLATION OF INSTRUMENTS—Worthless Checks.—Failure to return worthless checks before commencing an action for the cancellation of a note given therefor held not essential to the right to maintain the action.—Dille v. White, Iowa, 109 N. W. Rep. 909.

8. CARRIERS—Duty to Furnish Cars.—By the common law and by the statute it is the duty of a carrier to furnish transportation facilities for such goods, as it undertakes to carry to all who may apply for the same in the regular and expected course of business.—St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., Ark., 99 S. W. Rep. 875.

9. CARRIERS—Time of Transportation.—The fact that a passenger is riding on a freight train does not relieve the carrier of liability for injuries to him owing to negligent delay in transportation.—Green v. Missouri, K. & T. Ry. Co., Mo., 97 S. W. Rep. 646.

10. CARRIERS—Transportation of Live Stok.—Where cattle were held in shipping pens for any period of time after a carrier had agreed that cars should be ready for their shipment, the carrier was liable.—Southern Kansas Ry. Co. of Texas v. Morris, Tex., 99 S. W. Rep. 433.

11. CHARITIES—Liability for Negligence.—A private, or *quasi* private, charity, held not liable for negligence of employees, or its negligence in selecting them.—Adams v. University Hospital, Mo., 99 S. W. Rep. 453.

12. CONSTITUTIONAL LAW—Act Requiring Waterclosets at Station.—Act Twenty-ninth Legislature, p. 324, ch. 133, imposing penalties on railroads for failure to maintain waterclosets at passenger stations, does not deprive the railroads of equal protection of the laws.—Missouri, K. & T. Ry. Co. of Texas v. State, Tex., 97 S. W. Rep. 720.

13. CONSTITUTIONAL LAW—Waiver of Provisions.—Constitutional provisions for the benefit of person accused may be waived, and a conviction based on such waiver will be valid if it is pronounced by a court having jurisdiction and duly constituted to try the case.—Busse v. Barr, Iowa, 109 N. W. Rep. 920.

14. CONTRACTS—Assignment of Life Policy.—Where a life insurance policy was assigned to a bank for the benefit of itself and another, the bank agreeing to pay subsequent premiums, the insured held not bound to notify the bank of subsequent premium calls.—Scheele v. Lafayette Bank, Mo., 97 S. W. Rep. 621.

15. CORPORATIONS—Foreign Corporations.—A foreign corporation selling and delivering goods in the state on orders taken therefor by its agents and traveling salesmen and forwarded to it, and transacting no other business in the state, does not carry on business in the state within Code, ch. 54, § 30, as amended by Acts 1901, p. 108, ch. 35, § 31 [Code 1906, § 2822].—Underwood Typewriter Co. v. Piggott, W. Va., 55 S. E. Rep. 664.

16. CORPORATIONS—Receivers of Foreign Corporations.—A court of equity held to have power to appoint a receiver for a foreign corporation, and distribute its assets in the state; its affairs in the state of its domicile having been wound up and the receiver appointed therefor discharged.—Culver Lumber Co. v. Culver, Ark., 99 S. W. Rep. 391.

17. COVENANTS—Incumbrances—Grantee held not entitled to recover for breach of covenant against incumbrances, in absence of evidence of validity of tax alleged to constitute incumbrance.—White v. Gibson, Mich., 109 N. W. Rep. 1049.

18. CRIMINAL TRIAL—Bill of Exceptions.—Under Code 1906, ch. 131, § 9, a bill of exceptions signed by a judge in vacation within 30 days after the adjournment of the term is not a part of the record unless the judge certified the bill and the order certifying it was recorded.—Jones v. Harmer, W. Va., 55 S. E. Rep. 657.

19. CRIMINAL TRIAL—Instructions.—Where a proper instruction is refused, but modified and given, it is not reversible error if the instruction when modified is the same in legal effect as the one refused —Morrison v. Fairmount & C. Traction Co., W. Va., 55 S. E. Rep. 669.

20. CRIMINAL TRIAL—Judicial Notice as to Local Option.—The court will take judicial notice of a special statute whereby local option was in force where defendant sold liquor.—Ball v. Commonwealth, Ky., 99 S. W. Rep. 826.

21. CRIMINAL TRIAL—Refusal of Continuance.—A refusal to continue on the ground of the absence of a witness was not prejudicial where the witness did in fact appear and testify at the trial.—State v. Coleman, Mo., 97 S. W. Rep. 574.

22. CURTESY—Abolition of Curtesy Initiate.—The common law estate of curtesy initiate was abolished by Const. 1874, leaving only the possibility of the estate by the curtesy consummate.—Loyd v. Planters Mut. Ins. Co., Ark., 97 S. W. Rep. 658.

23. DAMAGES—Breach of Contract.—A contractor under contract for the construction of a building, who completes the work let to a subcontractor on his failure to do so, can recover of the subcontractor only the reasonable expenses for so doing.—Seventh St. Planing Mill Co. v. Shaefer, Ky., 99 S. W. Rep 341.

24. DEATH—Excessive Damages.—Where deceased was a sober and industrious man in good health, 54 years of age, who had provided well for his family, a verdict of $5,000 for his death was not excessive.—Johnson v. C. A. Smith Lumber Co., Minn., 109 N. W. Rep. 810.

25. DEEDS—Estate Conveyed.—A grant in a deed, of access to a certain spring held as much a part of the deed as though mentioned in the granting clause in connection with the land.—Rittenhouse v. Swango, Ky., 97 S. W. Rep. 743.

26. DEEDS—Grant on Condition.—In granting real estate on condition, where the performance of the act does not necessarily precede the vesting of the title, it is a condition subsequent.—Spies v. Arvondale & C. R. Co., W. Va., 55 S. E. Rep. 464.

27. DESCENT AND DISTRIBUTION—Rights of Surviving Wife.—Where a husband leaves no lineal heirs, his widow may take one-half of the realty, and homestead to the value of $1,500 in the remainder.—Coleman v. Coleman, Mo., 99 S. W. Rep. 459.

28. DISCOVERY—Right to Inspect Books.—Under Circuit Court Rule 50, 87 N. W. Rep 6, a plaintiff in an action on a contract held entitled to an order for a discovery of documents in the possession of defendant.—London Guarantee & Accident Co. v. Rohnert, Mich., 109 N. W. Rep. 1049.

29. DIVORCE—Cruel Treatment.—Where a continuance of cohabitation, in view of a continued course of ill treatment without physical violence, would impair the health and imperil the life of the wife, she was entitled to a divorce.—Hullinger v. Hullinger, Iowa, 110 N. W. Rep. 470.

30. DIVORCE—Death Pending Appeal.—A wife, appealing from a decree of divorce in favor of her husband who died since the submission of the case, held not entitled to counsel fees for services in prosecuting the appeal.—Strickland v. Strickland, Ark., 97 S. W. Rep. 659.

31. DIVORCE—Domicile.—Where husband and wife were married and resided in Utah, where the wife was abandoned, the courts of that state had jurisdiction in divorce, though the husband could not be personally served.—State v. Morse, Utah, 87 Pac. Rep. 705.

32. EASEMENTS—Right of Way.—Where a deed conveyed a right of way which was pointed out to complainants at the time, and was reasonably sufficient, complainants would be held to have acquiesced in its location.—Peduzzi v. Resteili, Vt., 64 Atl. Rep. 1128.

33. EJECTMENT—Ownership of Tide Lands.—Where a city owns lands in fee and has been ousted from possession, the action of trespass and ejectment is the appropriate action to establish title and recover possession, although the land may be covered by the tide.—City of Providence v. Comstock, R. I., 65 Atl. Rep. 307.

34. ELECTIONS—Review.—The supreme court will not set aside findings of fact by the trial court, especially in contested election cases, if such findings are supported by competent testimony.—Vigil v. Garcia, Colo., 87 Pac. Rep. 543.

35 ELECTION OF REMEDIES—Exchange of Property.—Where plaintiff rescinded an exchange of real estate for mining stock his suit to recover the land was dismissed, it was not an election of remedies precluding plaintiff from thereafter suing to recover the value of the land.—Dooley v. Crabtree, Iowa, 109 N. W. Rep. 889.

36. EMINENT DOMAIN—Additional Use of Land.—Where strip of land is condemned for railroad purposes, owner held not entitled to damages on laying of additional tracks on the right of way.—Louisville & N. R. Co. v. Scomp, Ky., 98 S. W. Rep. 1024.

37. EMINENT DOMAIN — Water Rights.—Pollution of fresh water, by tidewater flowing up a bayou from a salt water canal held a taking of property by eminent domain the same as though water had been introduced above plaintiff's land.—Bigham Bros. v. Port Arthur Canal & Dock Co., Tex., 97 S. W. Rep. 686.

38. EMINENT DOMAIN—Wharfage Rights.—Owners of lots adjoining a harbor who filled them out as authorized by Acts 1796, ch. 45, Acts 1801, ch. 92, and Acts 1805, ch. 94, and their successors in title, could not be deprived of their wharfage rights and privileges without their consent, except by the exercise of the power of eminent domain.—City of Baltimore v. Baltimore & Philadelphia Steamboat Co., Md., 65 Atl. Rep. 353.

39. EQUITY—Jurisdiction.—Where in equity an answer, praying for affirmative relief, is filed and the bill is dismissed because equity is without jurisdiction the dismissal of the bill carries with it the answer.—Spies v. Arvondale & C. R. Co., W. Va., 55 S. E. Rep. 464.

40. EQUITY—Laches —The defense that a claim is stale is purely an equitable one, and unless there is some natural justice back of it, a court of equity will not entertain it.—Bucher v. Hohl, Mo., 97 S. W. Rep. 922.

41. EXECUTORS AND ADMINISTRATORS — Foreign Administrator.—A foreign administrator who has not qualified in this state cannot sue or be sued.—McClellan's Adm'r v. Troendle, Ky., 99 S. W. Rep. 329.

42. FIRE INSURANCE—Evidence as to Authority of Agents.—In an action on a policy on gin property, evidence that defendant's local agents had written policies on similar property shortly before and after writing the policy in question held admissible.—St. Paul Fire & Marine Ins. Co. v. Stogner, Tex., 98 S. W. Rep. 218.

43. FIRE INSURANCE — Growing Crops.—Sess. Laws 1899, p. 176, art. 1, § 5, providing that an association may insure grain, growing wheat, rye, barley and "other crops" authorizes insurance of growing cotton.—State Mut. Ins. Co. v. Clevenger, Okla., 87 Pac Rep. 883.

44. FIRE INSURANCE—Proofs of Loss.—Where an agent *ex necessitate* to make proofs of loss commits a fraud, and her husband seeks to enforce the policy according to the proofs, he does not thereby become a party to the deceit.—Evans v. Crawford County Farmers' Mut. Fire Ins. Co., Wis., 109 N. W. Rep. 952.

45. FORCIBLE ENTRY AND DETAINER—What Constitutes.—The refusal to surrender real estate on demand to the person having the legal right thereto held constructively a forcible entry, for which an action will lie under the statute.—Redman v. Perkins, Mo., 98 S. W. Rep. 1097.

46. FRAUD—Rights of Bona Fide Purchaser.—Where plaintiffs were fraudulently induced to sign certain notes, which the payees assigned to *bona fide* purchasers for value without notice, plaintiff held entitled to recover the amount of the notes and interest without having actually paid the notes to the holders.—Luetzke v. Roberts, Wis., 109 N. W. Rep. 949.

47. GUARDIAN AND WARD—Ratification of Guardian's Account.—A ratification by a ward of his guardian's ac-

count held not a bar to a suit by a ward to surcharge the accounts and recover money realized from a mortgage received by the guardian.—Wilson v. Fidelity Trust Co., Ky., 97 S. W. Rep. 753.

48. HEALTH — Slaughter House — The owners of a slaughter house, though established by a statute or an ordinance, may be required to remove the same where its proximity to the residence portion of a city or village demands it.—City of Portland v. Cook, Oreg., 87 Pac. Rep. 772.

49. HIGHWAYS—Establishment.—An order, establishing a new highway, held not bad because the board of supervisors of the town met with the supervisors of an adjacent town to consider the application.—State v. Supervisors of Town of Clyde, Wis., 109 N. W. Rep. 985.

50. HIGHWAYS—Travelers. — Whether a mare, which coming out of a pasture and starting for the house, walked off a defective bridge in the highway, was a "traveler" on the bridge within the meaning of V. S. 3490, held to depend on whether or not her owner was guilty of contributory negligence.—Howrigan v. Bakersfield, Vt., 64 Atl. Rep. 1130.

51. HOMICIDE — Self-Defense. — In a prosecution for homicide committed in a conflict between two parties, self defense held not available if defendant's party commenced the fighting or if the fight was by mutual agreement.—Watkins v. Commonwealth, Ky., 97 S. W. Rep. 740.

52. HOMICIDE—Threats by Deceased.—In prosecution for murder, proof of threats of deceased against defendant communicated to defendant held to be considered in determining the question of reasonable grounds of apprehension by the defendant.—State v. Birks, Mo., 97 S. W. Rep. 578.

53. HUSBAND AND WIFE—Conveyances.—A quitclaim deed to a husband and wife held not to create an estate by entireties —Hank Lumber Co. v. Crothers, Mich., 109 N. W. Rep. 1066.

54. INDIANS—Guardianship —The Pueblo Indians of New Mexico are not wards of the government, nor are they in charge of an Indian superintendent, nor are they Indians over whom the government exercises guardianship, within Act Cong. Jan. 30, 1897, ch. 109, 29 Stat. 506; 3 Fed. St. Ann. p. 884, penalizing the sale or gift of intoxicants to Indians.—United States v. Mares, N. M., 89 Pac. Rep. 1128.

55. INJUNCTION — Criminal Prosecution.— A person threatened with prosecution for violation of municipal ordinance held not entitled to relief by injunction.—City of Tyler v. Story, Tex., 97 S. W. Rep. 856.

56. INJUNCTION — Removal of Railroad Tracks.—The owner of land dedicated for a street held entitled to a mandatory injunction to compel a railroad to remove additional tracks laid therein without other authority than a license previously granted for the laying of five sets of tracks.—Northern Cent. Ry. Co. v. Canton Co. of Baltimore, Md., 65 Atl. Rep. 837.

57. INSANE PERSONS—Conveyances.—Defendants, who purchased property conveyed to defendant's grantor by an incompetent, with knowledge of the incompetent's mental incapacity, held not entitled to maintain their title to the property —Rush v. Handley, Ky., 97 S. W. Rep. 726.

58. INSOLVENCY — New Promise to Pay.—Where the discharge of a debt was not by operation of law, but resulted from the voluntary act of the creditor in filing his claim, a new promise to pay is not enforceable.—Samuel Westheimer & Co. v. Flarsheim & Co., Ky., 99 S. W. Rep. 346.

59. INTOXICATING LIQUORS—Sale or Loan.—A loan of a pint of whisky, the same amount to be returned by the borrower, constitutes a sale.—Tombeaugh v. State, Tex., 98 S. W. Rep. 1054.

60. JUDGMENT—Complaint on Note.—After an answer to a verified complaint on a note has been stricken out as sham and unverified, and defendant has elected to stand on his answer, it is not error to adjudge him in default and render judgment without acting specifically on his motion for security for costs.—Pilant v. S. Hirsch & Co., N. M., 88 Pac. Rep 1129.

61. JUDGMENT—Decree Against Land for Taxes.—A decree against land for taxes held not subject to collateral attack, though the taxes for which the land was sold had been paid.—Shaaf v. Bradford, Mich., 109 N. W. Rep. 1061.

62. JUDGMENT—Motion for Judgment.—Where the person giving a notice of a motion for a judgment correctly describes himself as payee of the note sued on, the "assignee" added to his signature of the notice does not vitiate the notice.—Anderson v. Prince, W. Va., 55 S. E. Rep. 656.

63. JUDGMENT—Notwithstanding Verdict. — A motion for judgment notwithstanding the verdict should not be granted unless the record shows that the verdict is not sustained by the evidence and that there is no reasonable probability that defects in proof or pleadings can be remedied on a new trial.—Houghton Implement Co. v. Vavrousky, N Dak., 109 N. W. Rep. 1024.

64. LEVEES—Assessment.—One, asserting that the assessment on his land for work in a levee district is excessive, has the burden of overcoming the *prima facie* fairness equality of assessments established by the returns of the assessors.—Overstreet v. Levee Dist. No. 1, of Conway County, Ark., 97 S. W. Rep. 676.

65. MANDAMUS—Parties Plaintiff.—Two persons, claiming to have been elected councilmen of a city, held entitled to unite in *mandamus* to compel a canvass of the votes, etc.—State v. Kendall, Wash., 87 Pac. Rep. 821.

66. MARRIAGE—Identity of Parties.—Where a marriage is sought to be proved by the marriage certificate or a certified copy of the record, evidence of the identity of the parties must also be given.—State v. Thompson, Utah, 87 Pac. Rep. 709.

67 MASTER AND SERVANT—Contributory Negligence.—A person so afflicted as to make it extra hazardous for him to engage in lifting weights, who engages in such work without notifying the foreman of his employer of his condition, is guilty of contributory negligence.—Galveston, H. & S. A. Ry. Co. v. Bonn, Tex., 99 S. W. Rep. 413.

68. MASTER AND SERVANT—Contributory Negligence.—A brakeman injured by being struck by an obstruction near the track held precluded from recovering because of his failure to discharge his duty of looking out for such an obstruction as that which caused the injury.—Nashville, C. & St. L. Ry. Co. v. Hayes, Tenn., 99 S. W. Rep. 362.

69. MASTER AND SERVANT—Contributory Negligence.—An employee injured while operating a movable steam derrick in consequence of it partially overturning held not as a matter of law guilty of contributory negligence.—Redhead v. Dunbar & Sullivan Dredging Co., 101 N. Y. Supp. 801.

70. MASTER AND SERVANT—Duty to Instruct Servant.—A master held not negligent in not instructing a boy 17 years old, injured while putting a cover over pulleys at a machine.—Hess v. Escanaba Woodenware Co., Mich., 109 N. W. Rep. 1058.

71. MASTER AND SERVANT—Failure to Instruct.—That employees in a laundry were in the habit of feeding articles into the mangle over the guard did not relieve the employer from liability to an employee whom he failed properly to instruct as to the operation of the machine.—Ludwig v. Spicer, Minn., 109 N. W. Rep. 832.

72. MASTER AND SERVANT—Fellow Servants.—Negligence, if any, resulting in injury to a servant, held that of his fellow servants, for which the master was not responsible.—Pitts, Hankins & Trundle v. Centers, Ky., 98 S. W. Rep. 300.

73. MASTER AND SERVANT—Inventions by Servant.—Where, in a contract of general employment of inventing skill, there is an express agreement that the employer is to be the owner of any invention or improvement made by the employee, the employer becomes the owner

of the employee's inventions —Portland Iron Works v. Willett, Oreg., 89 Pac. Rep. 421.

74. MASTER AND SERVANT—Torts of Servant.—A telegraph company held under the facts not liable to one who was induced to cash a forged check by means of a forged telegram —Usher v. Western Union Telegraph Co., Mo., 98 S. W Rep. 84.

75. MECHANICS' LIENS—Contract by Owner or Agent. —A contract for improvement on land must have been made with the owner thereof or his authorized agent before a claim for a lien for the improvement can be maintained —Eccles Lumber Co. v. Martin, Utah, 87 Pac. Rep. 713.

76. MECHANICS' LIENS — When Authorized. — Where the wife is the exclusive owner of real estate and the husband contracts with a materialman to furnish material for a building thereon, the materialman is entitled to a lien for the amount of material furnished under St. 1893, p. 870, § 4527.—Limerick v. Ketcham, Okla., 87 Pac. Rep. 605.

77. MONOPOLIES—Federal Anti-Trust Laws.—An agreement between carriers and associations and citizens of a city binding the carriers to sell excursion tickets at a special low rate for certain occasions held not to contravene the state or federal anti-trust laws.—Lytle v. Galveston, H. & S A. Ry. Co., Tex., 99 S. W. Rep. 896.

78. MUNICIPAL CORPORATIONS—Care Required in Crossing Street.—A person crossing a street at a point other than a public crossing is bound to use only ordinary care with reference to the surrounding circumstances.—City of Covington v. Whitney, Ky., 99 S. W. Rep. 337.

79. MUNICIPAL CORPORATIONS—Ordinances.—A municipal ordinance to be valid must be free from discrimination against the sale or use of articles of lawful trade merely on the ground of the place of their production.—Town of Fulton v. Norteman, W. Va., 55 S. E. Rep. 658.

80. NAVIGABLE WATERS—Warfage Rights.—Where a city granted license to a steamboat company to extend its piers into a harbor, the right granted was subject to the limitations contained in the permits together with those imposed by law and inhering in the nature of the city's control over the navigable waters in question.—City of Baltimore v. Baltimore & Philadelphia Steamboat Co., Md., 65 Atl. Rep. 353.

81. PARENT AND CHILD — Emancipation.—The incarceration of a minor child in a state hospital for the insane without his father's consent is not an emancipation of the child, and does not relieve the father from liability for its care, he being otherwise responsible.—Guthrie County v. Conrad, Iowa, 110 N. W. Rap. 454.

82. PARTNERSHIP—Action Between Partners for Contribution.—A partner held to have had a right of action against the other partners to compel contribution after payment of a firm note by the former.—Moran Bros. Co. v. Watson, Wash., 87 Pac. Rep. 508.

83. PARTNERSHIP — Admissions. — Declarations of a partner that he is a partner or that others are partners with him held inadmissible to prove the partnership except so far as they bind the declarant as declarations against interest.—Franklin v. Hoadley, 101 N. Y. Supp. 874.

84. QUO WARRANTO—Remedy Against Corporation.—A corporation is a person, within Code, tit. 21, ch. 9, providing for proceedings in name of state against person unlawfully exercising franchise.—State v. Des Moines City Ry., Iowa, 109 N. W. Rep. 867.

85. RECEIVERS—Appointment.—Before equity will appoint a receiver of a debtor's property, the creditor must have a lien upon or some right to charge the property.—Thompson v. Adams, W. Va., 55 S. E. Rep. 668.

86. RECEIVERS—Appointment.—Equity, on application of a common creditor, is without jurisdiction to appoint a special receiver of the debtor's property on the ground of waste or misappropriation.—Thompson v. Adams, W. Va., 55 S. E. Rep. 668.

87. SALES—Construction of Contract.—Where it is not clear from a written contract of sale as to whether the parties intended a present or a future sale, the question is for the jury.—Massey Bros. v. Dixon Bros., Ark., 99 S. W. Rep. 883.

88 SALES—Special Machinery.—Defendant having contracted to construct an ice plant, held bound to construct it in accordance with such information concerning the uses for which the plant was intended, as it could reasonably obtain.—Wilmington Candy Co. v. Remington Mach. Co., Dela., 65 Atl. Rep. 74.

89. STREET RAILROADS—Duty on Seeing Person on Track.—A motorman upon discovering the perilous position of a person upon a trestle must use every means reasonably within his power to avoid running such person down.—Northern Texas Traction Co. v. Mullins, Tex., 99 S. W. Rep. 433.

90. STREET RAILROADS—Negligence.—It is negligence to start a street car while a passenger is alighting therefrom at the express or implied invitation of the carrier.—Burke v. Bay City Traction & Electric Co., Mich., 110 N. W. Rep. 524.

91. TAXATION—Recovery of Taxes Paid.—A taxpayer held not entitled to maintain an action against a county to recover taxes illegally and wrongfully exacted by county officers, after the taxes have been paid out by the disbursing officers.—Commonwealth v. Boske, Ky., 99 S. W. Rep. 316.

92. TRIAL—Documentary Evidence. — Where either party introduces a document, the opposite party may read as evidence introduced by the party who offers it so much of the balance as is relevant.—Crawford v. Roney, Ga., 55 S. E. Rep. 499.

93. TRIAL—Instructions.—One offering an instruction is entitled to have it given in his own language, if it correctly propounds the law, where there is evidence to support it and where it is not misleading.—Morrison v. Fairmont & C. Traction Co., W. Va., 55 S. E. Rep. 669.

94. TROVER AND CONVERSION—Mistaken Theory of Damages.—Complaint for value of Mexican money lost by plaintiff's servant at gambling held not subject to general demurrer because of mistaken theory of measure of damages —Ramirez v. Main, Ariz., 89 Pac. Rep. 508.

95. VAGRANCY — What Constitutes.—One who strolls about in idleness, with no lawful purpose, and who is a hibitual loafer, who is able to work, but has no property, and no regular income, held a vagrant, within the Penal Code 1895, § 453, par. 3.—Carter v. State, Ga., 55 S. E. Rep. 477.

96. VENDOR AND PURCHASER—Bond for Title.—A failure, not chargeable to the purchaser, to pay within the time specified the balance of the purchase price called for by a bond for title, held not to authorize a cancellation of the bond as a cloud on title.—East Jellico Coal Co. v. Carter, Ky., 97 S. W. Rep. 768.

97. VENDOR AND PURCHASER—Vendor's Lien.—Under a contract to sell lot and erect house thereon, vendor held entitled to lien though he gave deed before the house was complete.—Shaw v. Tabor, Mich., 109 N. W. Rep. 1046.

98. WILLS—Construction. —A will bequeathing rents and profits of property to testatrix's husband during life, providing that they should be incumbered by his debts, and that they should pass to her children if subjected to his debts by any court, is valid.—Bottom v. Fultz, Ky., 98 S. W. Rep. 1037.

99. WILLS—Estates Conveyed.—Under Pennsylvania law, where testator bequeathed his estate to his children in equal shares, directing that, if any child died without leaving surviving children, his share should pass to the survivors, the will vested a fee in such children as survived testator.—App v. App, Va., 55 S. E. Rep. 672.

100. WITNESSES—Credibility. — The admission of the record of defendant's conviction in a federal court, sitting in another state to affect his credibility as a witness, held not objectionable as giving extraterritorial force to such judgment.—Bail v. United States, U. S. C. C. of App., Ninth Circuit, 147 Fed. Rep. 82.